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DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-204506

DATE: November 23, 1981

MATTER OF: J. J. Broderick Company

DIGEST:

1. Timeliness provisions of GAO Bid Protest Procedures are strictly construed, and while contracting agency may impose stricter timeliness requirements than GAO, it may not waive GAO requirements. Thus, protest regarding alleged solicitation deficiencies, filed with agency after closing date for receipt of initial proposals, is untimely, and subsequent protest to GAO will be dismissed.
2. Agency's consideration on merits of untimely protest does not prevent GAO dismissal of same protest.
3. Acceptance of proposals on scheduled date, without amendment of protested specifications, constitutes initial adverse agency action, and any protest to GAO must be filed within 10 days thereafter. Protester does not have option of waiting until it receives written denial of protest to contracting agency before protesting to GAO.

J. J. Broderick Company protests what it alleges are faulty specifications in a solicitation issued by the Defense Depot Memphis, a field activity of the Defense Logistics Agency (DLA) located in Memphis, Tennessee.

The protested solicitation, No. DLA004-81-T-0001, was issued June 1, 1981, as the first step of a two-step, formally advertised procurement. The Defense Depot sought unpriced technical proposals for supply and installation of an automated storage system for medical supplies. We are dismissing the protest as untimely.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1981), state that when a protest has been filed with a contracting agency, we will consider a subsequent protest to our Office

if it is received within 10 days of initial adverse agency action. In addition, the protest to the agency must have been filed within the time limits specified in section 21.2(b) of our procedures. This section requires that alleged improprieties in a solicitation which are apparent before the closing date for receipt of initial proposals be protested by that date.

In this case, the amended closing date for receipt of initial proposals was July 24, 1981. The record indicates that Broderick discussed specifications with the contracting officer and that several letters were exchanged before the 24th; however, neither Broderick nor the contracting officer appears to have regarded these as protests. Broderick did not submit a proposal, but filed a two-part protest with the contracting officer; a letter dated July 31, 1981, which was labeled "Notice of Formal Protest, Part I," and stated that it was based on faulty specifications, and a second letter, dated July 17, 1981, which was labeled "Notice of Formal Protest, Part II," and stated that it pertained to "system concept inadequate/incorrect." Each letter also stated that it confirmed a wire of July 31, 1981.

In its report to our Office, DLA argues that the July 17, 1981 date on Part II is a mistake (presumably a typographical error) and that this portion of Broderick's protest actually was dated July 27, 1981. According to DLA, the telegram referenced in the two letters was sent on July 31, 1981; time-date stamps indicate that it was received on the Western Union printer at the Defense Depot on the 31st and in the Purchasing Branch on August 3, 1981. Time-date stamps on the letters show that they also were received in the Purchasing Branch on August 3, 1981. The envelope in which they were mailed had been postmarked July 31, 1981, in Washington, D.C.

The contracting officer denied Broderick's protest by letter dated August 18, 1981, which Broderick states it received on August 21, 1981. Broderick incorporated both of its letters to the Defense Depot and the contracting officer's written denial of its protest in a submission received by our Office on August 25, 1981. On the copy of the July 17 letter forwarded to us, the typewritten date had been changed by hand to July 27, 1981. Because it was not apparent how, when, or by whom the date had been changed, and since a protest filed July 17 could have been timely, we gave Broderick an opportunity to comment on this as well as on the substantive aspects of the agency report.

Broderick does not deny that July 27, 1981, was the correct date of its letter, but rather argues that since timeliness was not an issue with the contracting officer, DLA should not be allowed to raise this objection now. We disagree. The timeliness provisions of our procedures are strictly construed, Coventry Manufacturing Company, Inc., B-201626, April 21, 1981, 81-1 CPD 304, and while a contracting agency may impose stricter time limits for filing of protests to it, there is no provision permitting an agency to waive our requirements, Virginia Abrasives Corporation, 58 Comp. Gen. 33 (1978), 78-2 CPD 293. Moreover, an agency's consideration on the merits of a protest which is untimely under our procedures does not prevent our dismissal of the same protest. Id.

In the absence of any evidence that Broderick's wire or letters were received by the Defense Depot before the July 24, 1981 closing date for receipt of initial proposals, the time-date stamps must be considered prima facie evidence of the time of filing of the protest with the agency. See generally Linguistics Systems, Incorporated, 58 Comp. Gen. 403 (1979), 79-1 CPD 250. We therefore find that Broderick's formal protest was not timely filed with the agency, and we decline to consider it.

Broderick alternatively argues that we should consider its earlier discussions with the contracting officer as protests and/or that we should consider its protest to our Office timely because it was filed within 10 days of the contracting officer's denial of its formal protest. Neither is possible. Even if we regard Broderick's pre-opening discussions with the Defense Depot as a timely protest, the agency's acceptance of proposals on July 24, 1981, without amendment of the protested specifications was, of itself, initial adverse agency action, and any protest to our Office should have been filed within 10 days thereafter. Broderick did not have the option of waiting until it received a written denial from the contracting officer. See American Telephone and Telegraph Company, B-200989, August 19, 1981, 81-2 CPD 157.

~~The protest is dismissed.~~

Harry R. Van Cleve
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Acting General Counsel